Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

BRIGITTE RIEDL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Ninth Circuit adopted unreasonable requirements for petitions for writ of error coram nobis that go way beyond the requirements set forth by this Court in *United States v. Morgan* and conflict with every other circuit court of appeal.

PARTIES TO THE PROCEEDING

Petitioner Brigitte Riedl was the petitioner for a writ of error coram nobis before the United States District Court for the District of Hawaii, and the appellant/petitioner before the United States Court of Appeals for the Ninth Circuit.

Respondent is the United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
TABLE OF APPENDICES	vii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR ALLOWANCE OF THE WRIT	6
A. LACHES IS APPLICABLE TO A PETITION FOR WRIT OF ERROR CORAM NOBIS	6
B. LACHES ANALYSIS UNDER AEDPA	17
C. LACHES ANALYSIS UNDER THE VOID-FOR-VAGUENESS CLAIM	20
D. LACHES ANALYSIS UNDER THE INSUFFICIENCY OF THE EVIDENCE CLAIM	20
E. SOUNDS REASONS EXIST FOR FAILURE TO SEEK EARLIER RELIEF	23
CONCLUSION	29
PETITIONER'S APPENDIX	1a-41a

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Fenton
521 U.S. 203 (1997) 7 n.2

Blanton v. U.S.
94 F.3d 227 (6th Cir. 1996) 9

Carlisle v. U.S.
517 U.S. 416 (1996) 7 n.2

Davis v. United States
417 U.S. 333 (1974) 24

Estate of McKinney v. U.S.
71 F.3d 779 (9th Cir. 1995) 19

Foont v. U.S.
93 F.3d 76 (2nd Cir. 1996) 10 n.4, 28

Gardner v. Panama R. Co.
342 U.S. 29 (1951) 11

Guiterrez v. Waterman Steamship Corp.
373 U.S. 206 (1963) 11-12

Hirabayashi v. U.S.
828 F.2d 591 (9th Cir. 1987) 9, 15, 19

Holmberg v. Armbrecht
327 U.S. 392 (1946) 18

James v. United States
459 U.S. 1044 (1982) 9

Matus-Leva
287 F.3d 758 (9th Cir. 2002) 15

National R.R. Passenger Corp. v. Morgan
536 U.S. 101 (2002) 11

Rewak v. United States
512 F.2d 1184 (9th Cir. 1975) 19

Royal Air Properties, Inc. v. Smith
312 F.2d 210 (9th Cir. 1962) 18

Telink, Inc. v. U.S.
24 F.3d 42 (9th Cir. 1994) 8, 11, 15, 18

United States v. Correa-De Jesus
708 F.2d 1283 (7th Cir. 1983) 9

United States v. Darnell
716 F.2d 479 (7th Cir. 1983) 9

United States v. Mayer
235 U.S. 55 (1914) 9

United States v. Morgan
346 U.S. 502 (1954) *passim*

United States v. National Dairy Products Corp.
372 U.S. 29 (1963) 24

United States v. Schaflander
743 F.2d 714 (9th Cir. 1984) 24

United States v. Smith
331 U.S. 469 (1947) 7 n.2

U.S. v. Garcia
210 F.3d 1058 (9th Cir. 2000) 17, 18

U.S. v. Johnson
237 F.3d 751 (6th Cir. 2001) 10 n.3

U.S. v. Kwan
407 F.3d 1005 (9th Cir. 2005) 10, 11, 29

U.S. v. Mandanici
205 F.3d 519 (2nd Cir. 2000) 10 n.3

U.S. v. McClelland
941 F.2d 999 (9th Cir. 1991) 8

U.S. v. Riedl
496 F.3d 1003 (9th Cir. 2007) *passim*

U.S. v. Riedl
82 Fed. Appx. 538 (9th Cir. 2003) 4, 17

U.S. v. Riedl
164 F.Supp.2d 1196 (D.Hawai'i 2001) 28

U.S. v. Sawyer
239 F.3d 31 (1st Cir. 2001) 10 n.3

U.S. v. Tucor Int'l, Inc.
189 F.3d 834 (9th Cir. 1999) 19

CONSTITUTIONAL PROVISIONS

Fifth Amendment 1

STATUTORY PROVISIONS

18 U.S.C. § 982(a)(1) 3

18 U.S.C. § 1956(a)(3)(B) 2, 5, 6, 7

18 U.S.C. § 1956(c)(4) 3

28 U.S.C. § 1291 6

28 U.S.C. § 1651(a) 2, 6

28 U.S.C. § 2255 17, 18, 19, 23-24

TABLE OF APPENDICES

	Page
U.S. v. Riedl 496 F.3d 1003 (9th Cir. 2007)	1a
Order Denying Petition for Writ of Error Coram Nobis (Filed April 24, 2006)	17a
Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc (Filed October 11, 2007)	41a

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-16a)[1] is reported at *U.S. v. Riedl*, 496 F.3d 1003 (9th Cir. 2007). The Order of the United States District Court for the District of Hawaii (Pet. App. 17a-40a) is not reported but can be found at 2006 WL 1119162.

JURISDICTION

The Opinion of the Ninth Circuit was entered on August 6, 2007. A petition for panel rehearing with suggestion for rehearing en banc was denied on October 11, 2007. Pet. App. 41a. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651(a).

CONSTITUTIONAL PROVISION INVOLVED

The void-for-vagueness and sufficiency of the evidence claims raised by Brigitte Riedl ("Riedl") in the lower courts have a basis in the due process and double jeopardy clauses of the Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

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[1] The Appendix filed in connection with the Petition for Certiorari is cited herein as Pet. App. __.

> deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

The procedure used by Riedl to have her void-for-vagueness and sufficiency of the evidence claims adjudicated by the lower courts was a petition for writ of error coram nobis. The basis for the petition is the All Writs Act, 28 U.S.C. § 1651(a), which provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respecttive jurisdictions and agreeable to the usages and principles of law.

Riedl challenged the constitutional validity of the sting provision of the money laundering statute 18 U.S.C. § 1956(a)(3)(B), which provides:

> Whoever, with the intent—to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with

> the approval of, a Federal official authorized to investigate or prosecute violations of this section.

Also implicated in the void-for-vagueness constitutional claim is 18 U.S.C. § 982(a)(1), which provides:

> The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

Riedl's sufficiency of the evidence claim also implicates 18 U.S.C. § 1956(c)(4), which provides:

> [T]he term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree[.]

STATEMENT OF THE CASE

1. On November 24, 1999, a jury returned a verdict against Riedl of various offenses, "including five counts of money laundering in violation of 18 U.S.C. § 1956(a)(3)(B), . . ." *U.S. v. Riedl*, 496 F.3d 1003, 1004 (9th Cir. 2007), Pet. App. 4a. In a Special Ver-

dict Form for Forfeiture, "[t]he jury also found that the nine properties listed in the indictment were subject to forfeiture under 18 U.S.C. § 982(a)(1)." *U.S. v. Riedl*, 82 Fed.Appx. 538, 538 (9th Cir. 2003). *See also* Pet. App. 17a (District Court Order at 1).

2. On July 26, 2001, the District Court sentenced Riedl "to sixty-six months imprisonment, followed by three years of supervised release. On August 13, 2001, the Court issued a Final Order of Forfeiture." Pet. App. 18a (District Court Order at 2). "At sentencing, the district court granted Riedl a three-level downward departure for mental incapacity and sentenced her to 66 months of imprisonment." *U.S. v. Riedl*, 82 Fed. Appx. 538, 539 (9th Cir. 2003).

3. Riedl "appealed that order to the U.S. Court of Appeals for the Ninth Circuit." Pet. App. 18a (District Court Order at 2). On November 20, 2003, the Ninth Circuit affirmed the District Court's order finding that the forfeiture of Ms. Riedl's nine properties did not violate the Excessive Fines Clause of the Eighth Amendment. *See U.S. v. Riedl*, 82 Fed.-Appx. 538, 539-40 (9th Cir. 2003); Pet. App. 18a-19a (District Court Order at 3).

4. "According to documents provided to this Court by Defendant (and not disputed by the Government), an Immigration Court judge ordered that Defendant be removed from the United States to Austria because of her convictions in this Court. The Board of Immigration Appeals affirmed the decision and Defendant was deported to Austria on May 24, 2004." Pet. App. 19a (District Court Order at 3).

5. On January 18, 2006, Riedl filed a Petition for Writ of Error Coram Nobis in the United States Dis-

trict Court for the District of Hawaii. In her petition, Riedl asserted that the money laundering statute under which she was convicted, 18 U.S.C. § 1956(a)(3)(B) was constitutionally void-for-vagueness, and that the evidence at trial did not satisfy the legal requirement that the money laundering affected interstate commerce. *See* Pet. App. 19a (District Court Order at 3-4).

6. On April 24, 2006, the District Court "denied Riedl's coram nobis petition. The court agreed with Riedl that she had no other remedy available because she had already served her sentence, and that her money laundering convictions continued to have adverse consequences.

However, the court ruled that the two other requirements for obtaining coram nobis relief—a valid reason for delay in attacking a conviction, and a fundamental error in the underlying proceedings—were not satisfied." *Riedl*, 496 F.3d at 1005, Pet. App. 7a. "On the merits of the two claims, the court held that the money laundering statute clearly identifies the proscribed conduct and does not encourage arbitrary or discriminatory enforcement; and that Riedl's use of the First Hawaiian Bank and an escrow service for the money laundering created the requisite nexus with interstate commerce." *Ibid.*

7. Riedl filed a timely notice of appeal to the Ninth Circuit. *Riedl*, 496 F.3d at 1005, Pet. App. 7a. After briefing and oral argument, the Ninth Circuit entered its Opinion on August 6, 2007. *Riedl*, 496 F.3d at 1003, Pet. App. 1a. The Ninth Circuit affirmed the District Court's "denial of Riedl's petition for writ of error coram nobis. Riedl has offered no valid reasons for her delay in attacking her convictions,

and thus is ineligible for coram nobis relief. It is irrelevant that the government has not established prejudice as to Riedl's void-for-vagueness claim because the doctrine of laches only becomes applicable once a petitioner has satisfied the second coram nobis requirement, which Riedl has not." *Riedl*, 496 F.3d at 1009, Pet. App. 15a-16a.

The Ninth Circuit, by finding that Riedl offered no valid reasons for her delay in attacking the convictions, refused to address the merits of Riedl's constitutional claims: (1) that the money laundering statute under which she was convicted, 18 U.S.C. § 1956(a)(3)(B) was constitutionally void-for-vagueness; and (2) that the evidence at trial did not satisfy the legal requirement that the money laundering affected interstate commerce.

8. The Ninth Circuit denied Riedl's petition for rehearing with suggestion for rehearing en banc on October 11, 2007. Pet. App. 41a.

9. Initial jurisdiction in the District Court was based on 28 U.S.C. § 1651(a) (petition for writ of error coram nobis under the All Writs Act). The Ninth Circuit's jurisdiction was based on 28 U.S.C. § 1291 and 28 U.S.C. § 1651(a) (petition for writ of error coram nobis under the All Writs Act).

REASONS FOR ALLOWANCE OF THE WRIT

A. LACHES IS APPLICABLE TO A PETITION FOR WRIT OF ERROR CORAM NOBIS

In 1954, the Court considered the viability of the writ of error coram nobis and concluded that federal courts are authorized to issue the writ of error coram nobis pursuant to the All Writs Act, 28 U.S.C. §

1651(a)). *United States v. Morgan*, 346 U.S. 502 (1954). Since 1954, the courts of appeal have been interpreting and adopting rules based on *Morgan*. A number of these rules conflict with each other; a number of the rules make sense; and, as in the present case, some of the rules make no sense. Riedl asks the Court to revisit *Morgan* to clarify this confusion.[2]

The Ninth Circuit, by finding that Riedl offered no valid reasons for her delay in attacking the convictions, refused to address the merits of Riedl's constitutional claims: (1) that the money laundering statute under which she was convicted, 18 U.S.C. § 1956(a)(3)(B) was constitutionally void-for-vagueness; and (2) that the evidence at trial did not satisfy the legal requirement that the money laundering affected interstate commerce.

The issue in the present petition for writ of certiorari is thus limited to whether Riedl has satisfied

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[2] In *Carlisle v. U.S.*, the Supreme Court addressed the applicability of the writ of error coram nobis, even though "the District Court was not asked to issue, and did not purport to be issuing, a writ of *coram nobis*." *Carlisle v. U.S.*, 517 U.S. 416, 428-29 (1996). The Court noted that "'it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate.'" *Carlisle*, at 429 (quoting *United States v. Smith*, 331 U.S. 469, 475 n. 4 (1947)). The *Carlisle* Court's reliance on *Smith* is strange, given that subsequent to *Smith*, the Court found in *Morgan* (1954) a situation where the writ of error coram nobis would be necessary and appropriate. Thus, *Carlisle* should not be interpreted as overruling *Morgan*. Moreover, the Supreme Court has "declared that lower courts lack authority to determine whether adherence to a judgment of this Court is inequitable. Those courts must 'follow the [Supreme Court] case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Agostini v. Fenton*, 521 U.S. 203, 258 (1997) (GINSBURG, J., dissenting) (citation omitted).

Morgan's apparent requirement that she establish sound reasons for her failure to seek appropriate relief earlier. *Morgan*, at 512. The fundamental issues raised by Riedl in the District Court, and not addressed by the Ninth Circuit, will be presented to the Court in a separate petition for writ of error coram nobis after the Clerk docket's the present petition. Under the All Writs Act, the Supreme Court, in aid of its jurisdiction, would have authority to address the fundamental issues raised by Riedl. *See Morgan*, at 512 (noting that "[i]n the Mayer case this Court said that *coram nobis* included errors 'of the most fundamental character.'").

The Supreme Court has "held that *coram nobis* relief is available under certain circumstances to challenge the validity of a conviction even though the defendant is no longer in custody and the sentence has been fully served." *U.S. v. McClelland*, 941 F.2d 999, 1002 (9th Cir. 1991) (citing *Morgan*, 346 U.S. at 512-13). The Court has also recognized that "[b]ecause a petition for writ of error coram nobis is a collateral attack on a criminal conviction, the time for filing a petition is not subject to a specific statute of limitations." *Telink, Inc. v. U.S.*, 24 F.3d 42, 45 (9th Cir. 1994) (citing *Morgan*, 346 U.S. at 507).

In *Morgan*, the Court implicitly recognized that laches could be applied to a petition for writ of error coram nobis: "Where it cannot be deduced from the record whether counsel was properly waived, we think, no other remedy being then available and sound reasons existing for failure to seek appropriate earlier relief, this motion in the nature of the extraordinary writ of *coram nobis* must be heard by the federal trial court." *Morgan*, at 512.

While the Supreme Court's statement appears to be *dictum*; appellate courts have construed the Supreme Court's statement to mean that laches is applicable to a petition for writ of error coram nobis. The Six Circuit, like the Supreme Court in *Morgan*, "also has implied that laches could apply to a coram nobis proceeding." *Blanton v. U.S.*, 94 F.3d 227, 231 (6th Cir. 1996) (citation omitted). The Seventh Circuit has specifically held that "[l]aches is a bar to bringing a motion for a writ of *coram nobis*[.]" *United States v. Correa-De Jesus*, 708 F.2d 1283, 1286 (7th Cir. 1983) (citing *Morgan*, 346 U.S. at 512). The Seventh Circuit further noted that "the Supreme Court, in stressing society's substantial interest in the finality of judgments, stated that *coram nobis* relief is justified 'only under circumstances compelling such action to achieve justice' and only where 'sound reasons' exist for the failure to seek appropriate earlier relief. We turn to an examination whether Darnell's claims are barred by laches." *United States v. Darnell*, 716 F.2d 479, 480-81 (7th Cir. 1983) (citing *Morgan*, 346 U.S. at 511-512).

Several years later, the Ninth Circuit, based on the authority of *United States v. Mayer*, 235 U.S. 55 (1914), *United States v. Morgan*, 346 U.S. 502 (1954) and *James v. United States*, 459 U.S. 1044 (1982), adopted a four-part test to establish eligibility for relief under coram nobis: "(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." *Hirabayashi v. U.S.*, 828 F.2d 591, 604 (9th Cir. 1987) (footnote 14 omitted). The Ninth Circuit has "repeat-

edly reaffirmed this framework in the ensuing two decades." *Riedl*, 496 F.3d at 1006, Pet. App. 9a (citations omitted).[3]

The Ninth Circuit, like the Six and Seventh Circuits, has also "explained that a coram nobis petition 'is subject to the equitable doctrine of laches . . . [which] bars a claim if unreasonable delay causes prejudice to the defendant.'" *U.S. v. Kwan*, 407 F.3d 1005, 1013 (9th Cir. 2005) (citing *Telink, Inc.*, 24 F.3d at 45; *Hirabayashi*, 828 F.2d at 605).[4]

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[3] The First Circuit has "used a three-part test: a petitioner must 1) explain her failure to seek relief from judgment earlier, 2) demonstrate continuing collateral consequences, and 3) prove that the error is fundamental to the validity of the judgment." *U.S. v. Sawyer*, 239 F.3d 31, 38 (1st Cir. 2001).

The Second Circuit has required that a petitioner seeking a writ of error coram nobis demonstrate that: (1) there are circumstances compelling such action to achieve justice; (2) sound reasons exist for failure to seek appropriate earlier relief; and (3) the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting of the writ. *See U.S. v. Mandanici*, 205 F.3d 519, 524 (2nd Cir. 2000).

The Sixth Circuit has required that "[t]o be entitled to relief, the petitioner must demonstrate (1) an error of fact; (2) unknown at the time of trial; (3) of a fundamentally unjust character which probably would have altered the outcome of the challenged proceeding if it had been known." *U.S. v. Johnson*, 237 F.3d 751, 755 (6th Cir. 2001).

[4] However, the Second Circuit, contrary to the Seventh and Ninth Circuits, does:

> not read *Morgan* as incorporating a laches concept into the analysis of delay in bringing a coram nobis petition. The *Morgan* Court stated only that a petitioner need demonstrate "sound reasons" for delay, which we interpret as calling to the attention of the district court the circumstances surrounding the petitioner's failure to raise the issue earlier rather than the government's injury that resulted from the

The Ninth Circuit has required that "[t]o demonstrate laches, the 'defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself.'" *Danjaq v. Sony Corporation*, 263 F.3d 942, 951 (9th Cir. 2001) (citation omitted) (emphasis added). "Unreasonable delay, however, is not enough: 'In addition, laches requires prejudice.'" *Id.* at 955 (citation omitted) (emphasis added). More specifically, "[i]f a respondent seeks dismissal of a coram nobis petition on the ground of laches, the respondent bears the burden of showing he was prejudiced by the petitioner's delay." *U.S. v. Kwan*, 407 F.3d at 1013 (citing *Telink*, 24 F.3d at 47) (emphasis added). "If the government meets that burden, the burden of production of evidence then shifts to the petitioners to show either that the government actually was not prejudiced or that the petitioner exercised reasonable diligence in filing the claim." *Telink*, 24 F.3d at 47 (emphasis added).

Similarly, the Supreme Court has recognized that laches "'requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121-22 (2002) (citations omitted). "Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief." *Gardner v. Panama R. Co.*, 342 U.S. 29, 31, (1951) (citations omitted). Significantly, "the test of laches is prejudice to the other party." *Guiterrez v.*

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delay. The critical inquiry, then, is whether the petitioner is able to show justifiable reasons for the delay.

Foont v. U.S., 93 F.3d 76, 80 (2nd Cir. 1996).

Waterman Steamship Corp., 373 U.S. 206, 215 (1963) (citations omitted).

That a petitioner establish valid reasons for not attacking the conviction earlier is an element of a laches rebuttal, not a stand alone requirement for every petition for writ of error coram nobis. In other words, unless and until the Government demonstrates laches, the coram nobis petitioner is not required to state valid reasons for not attacking the conviction earlier. *See Riedl*, 496 F.3d at 1007, Pet. App. 12a. Therefore, the second coram nobis requirement should be stated: (2) valid reasons exist for not attacking the convictions earlier if the Government first establishes unreasonable delay by the plaintiff and prejudice to itself.

In the present case, the Government has not established unreasonable delay by Riedl or prejudice to itself. The Government stated that it:

> has been prejudiced by Riedl's failure to challenge her money laundering convictions on direct appeal and her four and one-half year delay in filing the Petition. At this point, it will be extremely difficult and expensive to reassemble the prosecution's case. It is unclear whether the necessary witnessses, evidence and trial materials are still available. During the six years since Riedl's trial in November 1999, memories have faded, and at least one witness who testified at trial, Charles Horstman, has died. The prosecution team has been dismantled and the two primary investigators, Honolulu police Department Detective John Souza and FBI Special Agent Alan Miyashiro have both

> retired. As the government has been prejudiced by Riedl's unreasonable delay, this Court should invoke the equitable doctrine of laches and deny the Petition.

Ninth Circuit Excerpts of Record ("ER") 118 (Opposition to Petition in District Court at 11). *See* Pet. App. 26a (District Court Order at 11).

The Ninth Circuit reasoned that:

> Riedl is incorrect that coram nobis relief is available as long as it is not barred by laches. Our decisions that have considered laches have done so only because the *government* invoked the doctrine as a supplemental defense. Those decisions have not purported to overrule the *Hirabayashi* framework, which places the initial burden of justifying delay squarely on the petitioner, nor as three-judge opinions could they have done so.

Riedl, 496 F.3d at 1008, Pet. App. 13a (italics in original). The Ninth Circuit makes a fundamental factual error in stating that "[h]ere, however, it is the petitioner Riedl who – unable to meet *Hirabayashi's* reasonable delay requirement – seeks to use laches to shift onto the government an initial burden to show prejudice, and thus to make her untimeliness irrelevant." *Riedl*, 496 F.3d at 1008, Pet. App. 14a. It was the *government* that invoked the doctrine of laches in the district court, ***not*** Riedl.

The Ninth Circuit's Opinion, "which requires us for the first time to confront the latent tension between the second coram nobis requirement and laches—we reaffirm the *Hirabayashi* framework and hold that the burden remained on Riedl to demon-

strate that her delay was reasonable. Given that her delay was unreasonable, she cannot now bring her untimely facial challenge simply because the government is unable to show prejudice as to a new trial." *Riedl*, 496 F.3d at 1009, Pet. App. 15a.

The Ninth Circuit went on to conclude that "the doctrine of laches only becomes applicable once a petitioner has satisfied the second coram nobis requirement, which Riedl has not." *Riedl*, 496 F.3d at 1009, Pet. App. 15a-16a. The Ninth Circuit could have just as easily concluded that the second coram nobis requirement only becomes applicable once a respondent has satisfied laches requirements, which the government has not. This alternate conclusion resolves the latent tension between *Hirabayashi* and *Telink*. The Ninth Circuit's resolution of its internal conflict turns longstanding laches law on its head. For example:

1. Coram nobis petitioner waits two years to file a petition.
2. Coram nobis petitioner offers valid reasons for not attacking her conviction sooner than two years.
3. The government invokes laches and is able to demonstrate both an unreasonable delay and prejudice to itself.
4. The burden then shifts back to the petitioner to show either that the government actually was not prejudiced or that petitioner exercised reasonable diligence in filing the petition.
5. Coram nobis petitioner offers valid reasons for not attacking her conviction sooner than two years or demonstrates that respondent was not prejudiced.

The Ninth Circuit conflates *Telink, Inc. v. U.S.*, 24 F.3d 42 (9th Cir. 1987) with *Hirabayashi v. U.S.*, 828 F.2d 591 (9th Cir. 1987), thereby creating an unreasonable requirement under a petition for writ of error coram nobis: "Considering the equitable doctrine of laches that Riedl cites under *Telink*, we hold that it does not supplant or restate the second *Hirabayashi* requirement [that valid reasons exist for not attacking the conviction earlier], but rather constitutes a supplemental defense that the government may invoke when a petitioner seeks coram nobis relief." *Riedl*, 496 F.3d at 1006, Pet. App. 9a. Under the Court's reasoning, it makes no sense for the Government to now assert laches as a defense, because the initial laches burden has shifted to the petitioner under the Ninth Circuit's Opinion in this case. The Ninth Circuit is the only circuit to adopt such a hybrid laches coram nobis requirement.

The courts of appeal have struggled with the Court's dictum in *Morgan* that "sound reasons exist for failure to seek appropriate earlier relief." *Morgan*, at 512. It is suggested that the courts of appeal have placed far too much weight on this one aspect of the writ. For example, the Ninth Circuit has noted that"[b]ecause these [four] requirements are conjunctive, failure to meet any one of them is fatal." *Matus-Leva*, 287 F.3d 758, 760 (9th Cir. 2002) (citation omitted). Under *Matus-Leva*, the four requirements are of equal weight. Thus, a court in the Ninth Circuit could take the easy way out in denying a petitioner's claim which might contain errors of the most fundamental character. There are no guidelines for the court's inquiry, and a court could arbitrarily deny a petition because it determines that sound reasons do not exist. In this regard, the courts of

appeal have unrestricted discretion to deny a petition under the sound reasons requirement. Guidance by this Court is necessary to maintain the integrity of the writ.

In the present case, the District Court noted that Riedl "has provided no valid reason for why she did not challenge the constitutionality of the money laundering statute and/or the sufficiency of the interstate commerce evidence at trial, during the extensive post-trial briefings and arguments before this Court, or in her appeal to the Ninth Circuit Court of Appeals." Pet. App. 22a (District Court Order at 7). "Nor has defendant provided any sound reason for why she did not raise these challenges in a motion pursuant to 28 U.S.C. § 2255, prior to her deportation." Pet. App. 24a (District Court Order at 8). *See Riedl*, 496 F.3d at 1006, Pet. App. 10a. This reasoning is arbitrary and contrary to Riedl's stated reasons and argument to the District Court and Ninth Circuit. That's not to say that a court should ignore the fact that a petitioner is still in custody, as no discretion is involved with that determination. However, the sound reasons requirement should be a secondary consideration of the fundamental error inquiry, "[o]therwise a wrong may stand uncorrected which the available remedy would right." *Morgan*, at 512.

Riedl submits that the main focus of the inquiry for issuance of the writ should be directed to the requirement that the error is "of the most fundamental character." *Morgan*, at 512. The Ninth Circuit, by finding that Riedl offered no valid reasons for her delay in attacking the convictions, avoided having to address the merits of Riedl's constitutional claims:

(1) that the money laundering statute under which she was convicted, 18 U.S.C. § 1956(a)(3)(B) was constitutionally void-for-vagueness; and (2) that the evidence at trial did not satisfy the legal requirement that the money laundering affected interstate commerce. If the Ninth Circuit had first found that 18 U.S.C. § 1956(a)(3)(B) was void-for-vagueness on its face, it would have been an absurd result for the Court to then find that although the statute she was convicted under is void *ab initio*, it's too late for her to challenge it. *See Riedl*, 496 F.3d at 1007, Pet. App. 11a (recognizing that the delay was "reasonable when the applicable [case] law was recently changed and made retroactive").

B. LACHES ANALYSIS UNDER AEDPA

Unique to Riedl's case was the fact that AEDPA's one-year limitations period to file a 28 U.S.C. § 2255 motion never expired. Riedl was under no legal obligation to file a 28 U.S.C. § 2255 motion under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Prior to the passage of AEDPA, "a federal prisoner had unlimited time in which to file a motion under 28 U.S.C. § 2255 (1994) ('A motion for such relief may be made at any time.'). As one of the many reforms, AEDPA instituted a one-year limitations period for collateral attacks by federal and state prisoners." *U.S. v. Garcia*, 210 F.3d 1058, 1059 (9th Cir. 2000).

Here, the Ninth Circuit issued its final order on November 20, 2003, affirming the District Court's order finding that the forfeiture of Riedl's nine properties did not violate the Excessive Fines Clause of the Eighth Amendment. *See U.S. v. Riedl*, 82 Fed.-Appx. 538 (9th Cir. 2003), Pet. App. 18a-19a. Thus,

under AEDPA, Riedl would have until November 20, 2004, to file a timely motion under 28 U.S.C. § 2255. However, *see U.S. v. Garcia*, 210 F.3d 1058, 1060 (9th Cir. 2000) (recognizing that the one year time period begins to run when the "time for filing a petition for certiorari expire[s]."). Riedl would have one year plus 90 days to file a timely motion under 28 U.S.C. § 2255. November 20, 2004 plus 90 days is February 20, 2005.

On May 23, 2004, the day before she was deported to Austria, she could have *possibly* filed a timely 28 U.S.C. § 2255 motion challenging the constitutional validity of the money laundering "sting" provision because she was still in custody and AEDPA's gatekeeping provisions had not yet expired. Had she not been deported on May 24, 2004, she would have had until February 20, 2005, to file a timely 28 U.S.C. § 2255 motion. Putting aside Riedl's reasons for not attacking the convictions sooner, she was under no legal obligation to file a 28 U.S.C. § 2255 motion:

> Generally speaking, if Congress has provided a specific limitations period, a court should not apply laches. In such cases, "[t]he Congressional Statute of limitations is definitive," *Holmberg v. Armbrecht*, 327 U.S. 392, 395, 66 S.Ct. 582, 584, 90 L.Ed. 743 (1946), and a petitioner "may do what he likes as long as he brings his suit within the stipulated period." *Royal Air Properties, Inc. v. Smith*, 312 F.2d 210, 214 (9th Cir. 1962).

Telink, Inc., v. U.S., 24 F.3d 42, 45 n. 3 (9th Cir. 1994) (emphasis added).

Taken together, the first and second *Hirabayashi* requirements make clear that when Riedl was deported on May 24, 2004, she was no longer in custody, and consequently 28 U.S.C. § 2255 was no longer available to her as a legal remedy. "[T]he writ [of error coram nobis] fills in a very precise gap. It affords the criminal defendant the right to vacate a conviction where relief is no longer available under the federal habeas corpus statute because the defendant is no longer in custody." *Estate of McKinney v. U.S.*, 71 F.3d 779, 782 n.5 (9th Cir. 1995) (citing *Telink*, 24 F.3d at 45).

Therefore, Riedl's first opportunity to file a petition for writ of error coram nobis would have been May 24, 2004. The question for the District Court or Ninth Circuit would have been whether the Government demonstrated that a 20-month delay (May 24, 2004 to January 18, 2006) in bringing the petition for writ of error coram nobis was unreasonable. *See U.S. v. Tucor Int'l, Inc.*, 189 F.3d 834, 836-38 (9th Cir. 1999) (granting coram nobis relief even though the petitioner waited four years after pleading guilty to file coram nobis petition and petitioner could have, but did not, raise same claim at the time of conviction); *Hirabayashi v. U.S.*, 828 F.2d 591, 605 (9th Cir. 1987) (rejecting argument that coram nobis petition, filed nearly forty years after conviction, should be dismissed on ground of laches where claim was based upon evidence that could have been, but was not, discovered years earlier); *Rewak v. United States*, 512 F.2d 1184, 1185 (9th Cir. 1975) (granting coram nobis petition for sentencing error ten years after petitioner was released from custody). Thus, Riedl was under no legal obligation to file a 28 U.S.C. § 2255 motion.

C. LACHES ANALYSIS UNDER THE VOID-FOR-VAGUENESS CLAIM

The District Court found that "[t]he Government has not demonstrated prejudice to its ability to respond to the void-for-vagueness constitutional challenge because opposition to the constitutional challenge does not require analysis of exhibits or other trial documents in the same manner that is necessary for opposition to the insufficiency of the evidence claim." Pet. App. 27a n.6 (District Court Order at 12 n. 6).

The District Court also noted that "[i]f the Court were to find the statute unconstitutionally vague, the Government could not seek to reprosecute Defendant under that unconstitutional statute (and the Government has not alleged that it could or would seek to prosecute Defendant under any alternative statute)." Pet. App. 27a (District Court Order at 12-13). Thus, the government has not established prejudice under laches with respect to Riedl's void-for-vagueness claim. That fact alone should have ended the inquiry into Riedl's timeliness in bringing her petition for writ of error coram nobis on her void-for-vagueness claim. *See also* Pet. App. 27a n.6 (District Court Order at 12 n.6).

D. LACHES ANALYSIS UNDER THE INSUFFICIENCY OF THE EVIDENCE CLAIM

The district court noted that:

> The Government cites to the potential unavailability of necessary witnesses, evidence, and trial materials. [See Opposition at 11.] The Government alleges that it would be

> "extremely difficult and expensive to reassemble the prosecution's case" because witnesses' memories have faded, one witness has died, the prosecution team has been dismantled, and the two primary investigators have retired. Id.
>
> The Government has demonstrated prejudice to its ability to respond to the sufficiency of the evidence claim in the Petition. For example, the Government's inability to access its trial materials and exhibits for purposes of its response to the Petition precludes the Government from identifying specific exhibits that may have proved the interstate commerce element that Defendant is now challenging as insufficiently proved. For example, a cashier's check or an application for a cashier's check (both admitted as evidence at trial) may contain some language suggesting that First Hawaiian Bank is involved in interstate commerce; however, unavailability of trial exhibits prevents the Government from reviewing those documents and making any appropriate argument here.

Pet. App. 26a-27a (District Court Order at 11-12) (emphasis added). In assessing the Government's reasons for establishing prejudice, the Government merely suggested that it is unclear whether the necessary witnesses, evidence, and trial materials are still available. ER 118 (Opposition at 11). The government was given thirty days to file a response to Riedl's petition. ER 117. Had the government submitted a declaration or affidavit stating which specific witnesses, which specific pieces of evidence,

and which specific trial materials were no longer available, Riedl could have responded in her reply with a detailed declaration or affidavit stating her reasons for not challenging the convictions sooner. Riedl could have also provided the trial materials and exhibits to the Government, as they were part of the Excerpts of Record submitted to the Ninth Circuit in the direct appeal of her convictions. Because the government had not established unreasonable delay or prejudice, Riedl was under no legal obligation to respond under laches.

Interestingly, the District Court stated that:

> if the Court were to find that there was insufficient evidence of interstate commerce to support the money laundering convictions, double jeopardy would bar a retrial on those money laundering counts. See United States v. Boulware, 384 F.3d 794, 809-810 (9th Cir. 2004) ("a challenge to the sufficiency of the evidence implicates a defendant's rights under the Double Jeopardy Clause"); United States v. Gergen, 172 F.3d 719, 724-725 (9th Cir. 1999) (defendant who successfully challenges a conviction for insufficiency of the evidence is entitled not only to a reversal of his conviction but also to a judgment of acquittal).

Pet. App. 27a-28a (District Court Order at 12-13). Thus, under either of Riedl's constitutional claims, a retrial would be unnecessary, the government could not establish prejudice to itself, and consequently, laches would be inapplicable as a defense.

In sum, laches is applicable to a petition for writ of error coram nobis. The government has not esta-

blished prejudice, Riedl was not required to provide a reasonable explanation for not challenging her convictions earlier under laches, and she was not attempting to abuse the writ—she was not attempting to re-litigate claims or circumvent AEDPA's procedural bars. Because there is no statute of limitations for coram nobis petitions, and because the Government had not established a laches defense, Riedl was not required to satisfy *Hirabayashi's* second requirement for coram nobis relief on either of her constitutional claims.

E. SOUND REASONS EXIST FOR FAILURE TO SEEK EARLIER RELIEF

Even if laches is not applicable to a petition for writ of error coram nobis, Riedl has offered sound reasons for any apparent failure to seek appropriate relief earlier. The Ninth Circuit observed that "[f]irst and most importantly, none of Riedl's reasons explains why she did not raise her void-for-vagueness or insufficient evidence claims during trial, on direct appeal or through a 28 U.S.C. § 2255 petition." *Riedl*, 496 F.3d at 1006, Pet. App. 10a.[5] As explained to the Court in her opening brief, while Riedl could have *possibly* raised the constitutional claims in the direct appeal to the Ninth Circuit *or* under 28 U.S.C. §

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[5] The Court stated that "[a]s the district court observed, Riedl's deportation argument 'does not explain why she did not challenge her conviction *prior* to her deportation,' either during the nine months between her release from prison and her deportation, or while she was still in prison." *Riedl*, 496 F.3d at 1006-1007, Pet. App. 10a (italics in original). While not relevant to this petition, Riedl was never released from prison prior to her deportation, and there was nothing in the record to support the Ninth Circuit's factual assumption.

2255,[6] there was no legal requirement for her to do so. *See Riedl*, 496 F.3d at 1006, Pet. App. 10a. Significantly, the Court has recognized that "[w]e do not think that the enactment of § 2255 is a bar to this motion, and we hold that the District Court has power to grant such a motion. [¶] Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." *Morgan*, at 511.

Moreover, "constitutional claims may be raised in collateral proceedings even if the defendant failed to pursue them on appeal." *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984) (citing *Davis v. United States*, 417 U.S. 333, 345 n. 15 (1974)). Thus, Riedl was not legally required to raise the constitutional issues, assuming that she or any of her attorneys even knew about them, during trial, on direct appeal, or under 28 U.S.C. § 2255. It is also highly unlikely that a trial attorney is going to be aware of constitutional claims during trial because there is a "strong presumptive validity that attach to an Act of Congress . . ." *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963). *See also Morgan*, at 512 (noting that "[i]t is presumed the proceedings were correct").

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[6] Riedl's statement in her opening brief that she "could have *possibly* raised the constitutional claims" was never intended to mean that she knew of those claims prior to her deportation. Riedl should have said that she could have *possibly* raised the constitutional claims had she been aware of them. The Ninth Circuit misconstrued Riedl's statement as a concession that was fatal to her request for the extraordinary writ of error coram nobis. *See Riedl*, 496 F.3d at 1006, Pet. App. 10a.

In the present case, Riedl has stated at least one sound reason for the 20-month delay in filing her petition: "Because Ms. Riedl was deported to Austria, her ability to find competent counsel willing to review her case and pursue her legal remedies under coram nobis took some time." *Riedl*, 496 F.3d at 1005, Pet. App. 6a. In Riedl's petition for rehearing to the Ninth Circuit, she elaborated on this reason by stating that:

> At the time of her deportation on May 24, 2004, Riedl had no attorneys. Present counsel was introduced to Ms. Riedl around May 24, 2004, and initially was unwilling to take on her case. Present counsel contacted Earle A. Partington, Esq. in Honolulu, Hawaii, a renowned post-conviction attorney, who reviewed her file with regard to post conviction relief and concluded that there was no merit to any post conviction relief.
>
> Present counsel received the file from Mr. Partington on or about January 3, 2005. Present counsel began reviewing the file toward the end of January 2005. The file consists of 14 volumes of transcripts, containing 1,570 pages, hundreds of pages of pleadings, hundreds of pages of presentence investigative reports, hundreds of pages of undercover tape recordings, as well as direct appeal briefs and hundreds of pages of direct appeal excerpts of record. Review of the entire file by present counsel took quite some time. Present counsel was the only attorney to discover that there were possibly two fundamental errors (void-for-vagueness and insufficient evidence claims) that could be

presented in a petition for writ of error coram nobis.[7] The petition was ready to file with the District Court of Hawaii the first part of November 2005. However, present counsel spent several months trying to find a Hawaii attorney to associate with to present the petition in the district court. The petition was filed on January 18, 2006, some 20 months after it first could have been filed. A mere 20-month delay would seem to be reasonable under the circumstances, given that:

> The law does not require Kwan to challenge his conviction at the earliest opportunity, it only requires Kwan to have sound reasons for not doing so. *Cf. United States v. Tucor Int'l, Inc.*, 189 F.3d 834, 836-38 (9th Cir. 1999) (granting coram nobis relief even though the petitioner waited four years after pleading guilty to file coram nobis petition and petitioner could have, but did not, raise same claim at the time of conviction); *Hirabayashi*, 828 F.2d at 605 (rejecting argument that coram nobis petition, filed nearly forty years after conviction, should be dismissed on ground of laches where claim was based upon evidence that could have been, but was not,

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[7] The Government in her Answering brief to the Ninth Circuit noted that "Riedl was represented at trial by David Klein. During the sentencing phase, she was represented by Alan Ellis, Richard J. Troberman, Wayne Anderson, Brook Hart and Myles Breiner. On direct appeal, Riedl was represented by J. Thomas Logan and William W. Stewart." *See* Pet. App. 23 n.3 (District Court Order at 8 n.3).

> discovered years earlier); *Rewak v. United States*, 512 F.2d 1184, 1185 (9th Cir. 1975) (granting coram nobis petition for sentencing error ten years after petitioner was released from custody).
>
> U.S. v. Kwan, 407 F.3d 1005, 1014 (9th Cir. 2005).

Petition for Rehearing, at 5-6.

In Riedl's Opening Brief to the Ninth Circuit, under the jurisdictional statement, she stated that:

> The Ninth Circuit has jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 1651(a). *See* United States v. Morgan, 346 U.S. 502, 506 (1954) (recognizing that federal courts are authorized to issue the writ of error coram nobis pursuant to the All Writs Act, 28 U.S.C. § 1651(a)). Under the All Writs Act, this Court, like the Supreme Court and District Court, is authorized to issue the writ of error coram nobis since the writ would be in aid of the Court's jurisdiction under 28 U.S.C. § 1291.

Opening Brief, at 3. Thus, it would have been proper for the Ninth Circuit under the All Writs Act to consider the elaboration of Riedl's ability to find competent counsel willing to review her case as a sound reason for not attacking her convictions earlier.

Riedl also stated that "her 66-month incarceration period, her diminished capacity, and the fact that the Government had seized nine of her real properties worth $2.7 million prevented her from attacking her convictions earlier." *Riedl*, 496 F.3d at 1005, Pet. App. 6a-7a.

With respect to Riedl's diminished capacity, the Ninth Circuit noted that "[t]he degree of her mental impairment was in any case 'limited' as 'demonstrated by [her] ability to accumulate significant properties and assets, manage her assets, and devise and implement a sophisticated laundering scheme.' *United States v. Riedl*, 164 F.Supp.2d 1196, 1201 (D.Haw.2001)." *Riedl*, 496 F.3d at 1007, Pet. App. 11a. More importantly, the District Court "[found] that Defendant suffers from significantly reduced mental capacity which entitles her to a [three level] downward departure in sentencing . . ." *U.S. v. Riedl*, 164 F.Supp.2d 1196, 1201 (D.Hawai'i 2001). Riedl's significantly reduced mental capacity was a sound reason for not attacking her convictions sooner. The Second Circuit stated that "the petitioner's 'mental state' constituted sound reasons for the fifteen-year delay [in petitioning for the writ of error coram nobis]. *Nicks v. United States*, 835 F.Supp. 151, 155 (S.D.N.Y. 1993) (on remand) (Haight, *J.*)" ('to the extent that [the petitioner's] mental state must be factored into the equation, a sound reason emerges for his failure to petition at an earlier time for *coram nobis* relief')." *Foont v. U.S.*, 93 F.3d 76, 80 (2nd Cir. 1996). Thus, Riedl's significantly reduced mental capacity would have been a sound reason for not attacking her convictions sooner.

The Ninth Circuit also recognized that "Riedl's diminished capacity and the forfeiture of some of her properties do not justify her tardiness, because she was represented by counsel at least until November 2003, when her direct appeal to this court was denied." *Riedl*, 496 F.3d at 1007, Pet. App. 11a. The Court's observation raises another sound reason for Riedl's purported untimeliness: Her eight trial and

appellate attorneys were ineffective for not raising her constitutional claims earlier. *See* Page 26 n.7, *supra*.

The Ninth Circuit also recognized that "[w]hile courts have not elaborated on what constitutes a 'sound' reason, our review of coram nobis cases reveals that courts have denied relief on this ground where the petitioner has delayed for no reason whatsoever, where the respondent demonstrates prejudice, or where the petitioner appears to be abusing the writ." *U.S. v. Kwan*, 407 F.3d at 1013. Riedl's 20-month delay was reasonable: Riedl stated several sound[8] reasons; the government could not demonstrate prejudice; and Riedl was not abusing the writ. Accordingly, the District Court and Ninth Circuit improperly denied her coram nobis petition as untimely. Ms. Riedl respectfully asks the Court to elaborate on *Morgan's* apparent requirement that a petitioner establish sound reasons for failing to seek appropriate relief earlier, and whether laches can be applied to a coram nobis proceeding.

CONCLUSION

For all the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Brigitte Riedl

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[8] If a tree falls in the forest and no one hears it, has it made a sound?

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	No. 06-10424
v.	D.C. No. CR-98-00624 ACK
BRIGITTE RIEDL, *Defendant-Appellant.*	OPINION

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted
July 10, 2007—San Francisco, California

Filed August 6, 2007

Before: David R. Thompson, Pamela Ann Rymer and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

SUMMARY

Criminal law and Procedure/Writs

The court of appeals affirmed a judgment of the district court. The court held that a coram nobis petitioner's claims that her delay in raising both her facial challenge to her statute of conviction and her

insufficient evidence argument was due to her deportation, her incarceration, her diminished capacity, and the forfeiture of some of her properties were not valid reasons for relief.

In 2006, after serving her 66-month prison sentence for her 1999 conviction for money laundering in violation of 18 U.S.C. § 1956(a)(3)(B), appellant Brigitte Riedl petitioned for a writ of error coram nobis in district court in Hawaii. Riedl, who was deported to Austria in 2004 after serving her sentence, contended that the money laundering statute was unconstitutionally vague, and that there was insufficient evidence that her activities affected interstate commerce. Riedl claimed that her failure to raise her facial challenge to the statute and her insufficient evidence argument sooner was due to her deportation, her incarceration, her diminished capacity, and the forfeiture of some of her properties. The district court denied Riedl's petition.

Riedl appealed, conceding that nothing prevented her from asserting her claims earlier. Riedl argued, however, that she was not required to provide valid reasons for her delay until the government first established it would be prejudiced by the late assertion of her void-for-vagueness and insufficient evidence claims.

[1] The writ of error coram nobis is a highly unusual remedy, available only to correct grave injustices in a narrow range or cases where no more conventional remedy is applicable. [2] To qualify for coram nobis relief, a petitioner must show: (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3)

adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character. [3] None of Riedl's reasons explained why she did not raise her claims during trail, on direct appeal, or through a 28 U.S.C. § 2255 petition. Riedl's concession was fatal to her request that the extraordinary writ of error coram nobis be issued.

[4] The specific reasons that Riedl offered for her tardiness were also unpersuasive. Prisoners are able to challenge their convictions while in custody through direct appeal or a petition for a writ of habeas corpus. [5] Riedl's diminished capacity and the forfeiture of some of her properties did not justify her tardiness, because she was represented by counsel. And even after forfeitures, Riedl's net worth was estimated at over $850,000. [6] The Ninth Circuit has never found reasons similar to those put forth by Riedl as justifying coram nobis relief. [7] It had to be held that Riedl failed to demonstrate that valid reasons existed for not attacking the convictions earlier. The district court properly denied her coram nobis petition.

[8] Under laches, the government first must make a prima facie showing of prejudice. If the government meets that burden, the burden of production of evidence then shifts to the petitioners to show either that the government actually was not prejudiced or that the petitioner exercised reasonable diligence in filing the claim. [9] Even under a laches analysis, Riedl's insufficient evidence claim would be barred because the unavailability of some of the evidence and witnesses from Riedl's trial would hamper the

government's case. On the other hand, if Riedl's void-for-vagueness challenge to the money laundering statute were to succeed, the government would not be prejudiced, because it would be unable to retry her at all. In this context—which required the court of appeals for the first time to conform the latent tension between the second coram nobis requirement and laches—it had to be held that the burden remained on Riedl to demonstrate that her delay was reasonable. [10] The doctrine of laches only becomes applicable once a petitioner has satisfied the second coram nobis requirement, which Riedl did not. The judgment of the district court had to be affirmed.

COUNSEL

Kenneth Owen (argued), [Castro Valley, CA] for the appellant.

Edward H. Kubo, Jr., United States Attorney, and Rachel S. Moriyama (argued), Assistant United States Attorney, Honolulu, Hawaii, for the appellee.

OPINION

FISHER, Circuit Judge:

Brigitte Riedl was convicted of various offenses in 1999, including five counts of money laundering in violation of 18 U.S.C. § 1956(a)(3)(B), and served her resulting 66-month prison sentence. Although she has been released from custody, she now petitions for a writ of error coram nobis. She contends that the money laundering statute under which she was

convicted is unconstitutionally vague, and that there was insufficient evidence that her activities affected interstate commerce.

We agree with the district court that Riedl's petition must be denied. She has failed to provide any valid reasons for waiting so long to challenge her convictions on these grounds, and thus plainly does not satisfy the requirements for the highly unusual remedy of coram nobis relief. *See Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987) (adopting four factors as predicates for coram nobis relief, including that "valid reasons exist for not attacking the conviction earlier"). Riedl attempts to overcome her unjustified delay by invoking the equitable doctrine of laches, arguing that the government has not been prejudiced by her tardiness. *Cf. Telink, Inc. v. United States*, 24 F.3d 42, 45 (9th Cir. 1994) (addressing laches in coram nobis context). We reject the notion that a petitioner can employ laches in such a fashion. To follow Riedl's suggestion under the circumstances of this case would transform the extraordinary writ of coram nobis into a free pass for attacking criminal judgments long after they have become final.

I. BACKGROUND

Riedl was convicted by a jury in November 1999 on various counts, including five counts of money laundering in violation of 18 U.S.C. § 1956(a)(3)(B). The jury also found that nine properties Riedl owned were involved in the money laundering and hence subject to forfeiture. The court sentenced Riedl to 66 months in prison for her offenses.

Riedl's money laundering activities took place during a joint "sting" operation by the Honolulu Police Department (HPD) and the Federal Bureau of Investigation in 1997-98. Female undercover HPD officers initially identified themselves to Riedl as prostitutes and rented rooms by the night in her various properties. The officers later told Riedl that they had begun selling drugs and were flush with cash as a result. Riedl and the officers then came up with a scheme to convert the purported drug money into cashier's checks, which in turn were used as deposits for the purchases of various properties Riedl owned. Riedl was present each time the cashier's checks were procured, and she also prepared contracts for all of the real estate transactions. At all relevant times, the officers told Riedl they were purchasing her properties with drug money. Riedl was finally arrested, and the sting operation terminated, in October 1998.

Riedl served her prison sentence and later was deported to Austria in May 2004. She filed a petition for a writ of error coram nobis in January 2006, more than six years after her conviction, alleging that the money laundering statute under which she was convicted is unconstitutionally vague, and that the evidence at trial was insufficient to establish that her money laundering affected interstate commerce. Her petition explained the reasons for her failure to raise these challenges earlier as follows:

> Because Ms. Riedl was deported to Austria, her ability to find competent counsel willing to review her case and pursue her legal remedies under coram nobis took some time. Also, her 66-month incarceration period, her

> diminished capacity, and the fact that the Government had seized nine of her real properties worth $2.7 million prevented her from attacking her convictions earlier.

The district court denied Riedl's coram nobis petition. The court agreed with Riedl that she had no other remedy available because she had already served her sentence, and that her money laundering convictions continued to have adverse consequences. However, the court ruled that the two other requirements for obtaining coram nobis relief — a valid reason for the delay in attacking a conviction, and a fundamental error in the underlying proceedings — were not satisfied. The court was unpersuaded by Riedl's explanations for her delay, because they did not account for her failure to assert her claims on direct appeal or through a 28 U.S.C. § 2255 petition. The court also found that the government was prejudiced as to Riedl's insufficient evidence claim, because some of the evidence the government presented at trial was no longer available, but not as to her void-for-vagueness claim, because no retrial would be possible if the money laundering statute were ruled unconstitutional. On the merits of the two claims, the court held that the money laundering statute clearly identifies the proscribed conduct and does not encourage arbitrary or discriminatory enforcement; and that Riedl's use of the First Hawaiian Bank and an escrow service for the money laundering created the requisite nexus with interstate commerce.

The district court entered its judgment in April 2006, and Riedl timely appealed.

II. STANDARD OF REVIEW

A district court's denial of a petition for a writ of error coram nobis is reviewed de novo. *See Matus-Leva v. United States*, 287 F.3d 758, 760 (9th Cir. 2002).

III. DISCUSSION

[1] Both the Supreme Court and we have long made clear that the writ of error coram nobis is a highly unusual remedy, available only to correct grave injustices in a narrow range of cases where no more conventional remedy is applicable. In *United States v. Morgan*, 346 U.S. 502, 511 (1954), the Court characterized the writ as an "extraordinary remedy" that should be granted "only under circumstances compelling such action to achieve justice." *See also Carlisle v. United States*, 517 U.S. 416, 429 (1996) ("'[I]t is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate.'") (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)) (second alteration in original). Similarly, we have described the writ as "extraordinary," *Hirabayashi*, 828 F.2d at 604, "used only to review errors of the most fundamental character," *Matus-Leva*, 287 F.3d at 760, and "fill[ing] a very precise gap in federal criminal procedure," *Telink*, 24 F.3d at 45.

[2] In *Hirabayashi*, consistent with the extraordinary nature of coram nobis relief, we adopted the following framework for deciding when the writ should be issued:

> [A] petitioner must show the following to qualify for *coram nobis* relief: (1) a more

> usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character.

Hirabayashi, 828 F.2d at 604. We have repeatedly affirmed this framework in the ensuing two decades. *See, e.g.*, *United States v. Kwan*, 407 F.3d 1005, 1011 (9th Cir. 2005); *Matus-Leva*, 287 F.3d at 760; *Estate of McKinney v. United States*, 71 F.3d 779, 781-82 (9th Cir. 1995); *United States v. McClelland*, 941 F.2d 999, 1002 (9th Cir. 1991); *United States v. Walgren*, 885 F.2d 1417, 1420 (9th Cir. 1989). Applying the second *Hirabayashi* factor, we hold that Riedl has not offered valid reasons for her delay in attacking her convictions. Considering the equitable doctrine of laches that Riedl cites under *Telink*, we hold that it does not supplant or restate the second *Hirabayashi* requirement, but rather constitutes a supplemental defense that the government may invoke when a petitioner seeks coram nobis relief.

A. Valid reasons for delay

Riedl asserts that her failure to raise her facial challenge to the statute and her insufficient evidence argument sooner was attributable to her deportation to Austria, her incarceration, her diminished capacity and the forfeiture of some of her properties. We agree with the district court that these reasons, both individually and in combination, do not justify her delay.

[3] First, and most importantly, none of Riedl's reasons explains why she did not raise her void-for-vagueness or insufficient evidence claims during trial, on direct appeal or through a 28 U.S.C. § 2255 petition. The relevant law has remained the same throughout this litigation, and Riedl actually filed post-verdict motions with the district court and a direct appeal with this court, none of which mentioned her present claims. Notably, Riedl herself concedes that nothing prevented her from asserting her claims earlier, stating in her briefing that she "could have *possibly* raised the . . . claims in the direct appeal to the Ninth Circuit *or* under 28 U.S.C. § 2255" (her emphasis). This concession is fatal to Riedl's request that the extraordinary writ of error coram nobis be issued here. *See Maghe v. United States*, 710 F.2d 503, 503-04 (9th Cir. 1983) (denying coram nobis petition as untimely where claim could have been raised earlier and there were no sound reasons for the delay); *cf. United States v. Keane*, 852 F.2d 199, 202 (7th Cir. 1988) ("Claims that could have been raised by direct appeal are outside the scope of the writ [of coram nobis].").

[4] The specific reasons that Riedl offers for her tardiness are also unpersuasive. As the district court observed, Riedl's deportation argument "does not explain why she did not challenge her conviction *prior* to her deportation," either during the nine months between her release from prison and her deportation, or while she was still imprisoned. Additionally, even taking into account the difficulty of litigating in the United States while residing abroad, Riedl has not accounted for the further 20-month delay between her deportation and the filing of her coram nobis petition. Riedl's reference to her incarceration

period is similarly unhelpful, as prisoners are able to challenge their convictions while in custody through direct appeal or a petition for a writ of habeas corpus.

[5] Lastly, Riedl's diminished capacity and the forfeiture of some of her properties do not justify her tardiness, because she was represented by counsel at least until November 2003, when her direct appeal to this court was denied. The degree of her mental impairment was in any case "limited," as "demonstrated by [her] ability to accumulate significant properties and assets, manage her assets, and devise and implement a sophisticated laundering scheme." *United States v. Riedl*, 164 F. Supp. 2d 1196, 1201 (D. Haw. 2001). And even after the forfeitures her net worth was estimated at $861,030 — far more money than most criminal defendants have at their disposal to challenge their convictions.

[6] Not surprisingly, no decision of this court has found reasons similar to those put forth by Riedl as justifying coram nobis relief. Rather, we have considered delay to be reasonable when the applicable law was recently changed and made retroactive, *see Walgren*, 885 F.2d at 1421, when new evidence was discovered that the petitioner could not reasonably have located earlier, *see Hirabayashi*, 828 F.2d at 605, and when the petitioner was improperly advised by counsel not to pursue habeas relief, *see Kwan*, 407 F.3d at 1013. We and our sister circuits have rejected coram nobis petitions as untimely when the petitioner took 25 years to challenge an undesirable army discharge that he had not previously tried to upgrade, *see Maghe*, 710 F.2d at 503-04, when there was a seven-year delay during which the petitioner

did not exercise due diligence, *see Klein v. United States*, 880 F.2d 250, 254 (10th Cir. 1989), and when the petitioner waited 16 years to relitigate a claim that had been raised and then dropped on direct appeal, *see United States v. Correa-De Jesus*, 708 F.2d 1283, 1284-86 (7th Cir. 1983). Riedl's situation is plainly more analogous to *Maghe*, *Klein* and *Correa-De Jesus* than to *Walgren*, *Hirabayashi* and *Kwan*. Like the petitioners in the former group of cases, she has failed to offer any legitimate explanations for not raising her challenges to her convictions sooner or through more usual channels.

[7] We therefore hold that Riedl has failed to demonstrate that "valid reasons exist for not attacking the conviction[s] earlier." *Hirabayashi*, 828 F.2d at 604. Accordingly, the district court properly denied her coram nobis petition.

B. Laches

Riedl argues, however, that she was not required to provide valid reasons for her delay until the government first established it would be prejudiced by the late assertion of her void-for-vagueness and insufficient evidence claims. In her view, "[t]hat a petitioner establish valid reasons for not attacking the conviction earlier is an element of a laches rebuttal . . . . [U]nless and until the Government demonstrates laches, the coram nobis petitioner is not required to state valid reasons for not attacking the conviction earlier." We disagree. Riedl's approach would largely eviscerate the gate-keeping framework *Hirabayashi* articulated and open the door to inexcusably late claims. The cases Riedl cites do not compel granting

defendants such an easy path to the extraordinary writ of coram nobis.

[8] As a preliminary matter, Riedl is correct that laches operates differently from the second coram nobis requirement. Under the *Hirabayashi* framework, the burden of proof is on the petitioner to offer valid reasons for the delay. *See id.* Under laches, on the other hand, "the government first must make a prima facie showing of prejudice . . . . If the government meets that burden, the burden of production of evidence then shifts to the petitioners to show either that the government actually was not prejudiced or that the petitioner exercised reasonable diligence in filing the claim." *Telink*, 24 F.3d at 47; *see also Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1083 (9th Cir. 2000) (laches requires "a defendant [to] prove both an unreasonable delay by the plaintiff and prejudice to itself"). It is also true that some of our decisions have cited laches in their discussions of coram nobis petitions' timeliness. *See, e.g.*, *Kwan*, 407 F.3d at 1013-14; *Telink*, 24 F.3d at 45-48; *Hirabayashi*, 828 F.2d at 605.

Nevertheless, Riedl is incorrect that coram nobis relief is available as long as it is not barred by laches. Our decisions that have considered laches have done so only because the *government* invoked the doctrine as a supplemental defense. Those decisions have not purported to overrule the *Hirabayashi* framework, which places the initial burden of justifying delay squarely on the petitioner, nor as three-judge opinions could they have done so. Indeed, in *Hirabayashi* itself we analyzed the applicability of laches only because "*[t]he government argue[d]* that the district court should have dismissed the petition-

er's claim on the ground of laches," 828 F.2d at 605 (emphasis added), and in *Kwan* we stated that "*[i]f a respondent [i.e., the government] seeks dismissal of a coram nobis petition on the ground of laches*, the respondent bears the burden of showing [it] was prejudiced by the petitioner's delay," 407 F.3d at 1013 (emphasis added). Likewise, it was the government that relied on laches in *Telink* — as did the district court in denying the coram nobis petition. *See Telink*, 24 F.3d at 44 ("The district court concluded that the petitioners' claim was barred by laches."); Brief of United States at 23-25, *Telink*, 24 F.3d 42 (No. 93-50034), 1993 WL 13101350 (invoking doctrine of laches and arguing that "the Government had made a prima facie showing of prejudice").

Moreover, none of our previous decisions involved any conflict between the second coram nobis requirement and laches. In *Hirabayashi* and *Kwan*, for instance, the petitioners offered valid reasons for their delay and there was no showing by the government of prejudice; therefore both the second coram nobis requirement and laches supported a holding of timeliness. In *Telink*, on the other hand, petitioners failed to exercise reasonable diligence and the government was thereby prejudiced; therefore both the second coram nobis requirement and laches supported a denial of the petition as untimely.

[9] Here, however, it is the petitioner Riedl who — unable to meet *Hirabayashi*'s reasonable delay requirement — seeks to use laches to shift onto the government an initial burden to show prejudice, and thus to make her untimeliness irrelevant. Even under a laches analysis, Riedl's insufficient evidence claim would be barred because, as the district court

found, the unavailability of some of the evidence and witnesses from Riedl's trial would hamper the government's ability to prove that her money laundering affected interstate commerce. *See Telink*, 24 F.3d at 48. On the other hand, if Riedl's void-for-vagueness challenge to the money laundering statute were to succeed, the government would not be prejudiced, because it would be unable to retry her at all. *But see Foont v. United States*, 93 F.3d 76, 80 (2d Cir. 1996) (noting "government's interest in the finality of convictions"). In this context — which requires us for the first time to confront the latent tension between the second coram nobis requirement and laches — we reaffirm the *Hirabayashi* framework and hold that the burden remained on Riedl to demonstrate that her delay was reasonable. Given that her delay was unreasonable, she cannot now bring her untimely facial challenge simply because the government is unable to show prejudice as to a new trial. As the Second Circuit persuasively reasoned in comparable circumstances in *Foont*, "the proper standard by which the existence of 'sound reasons' should be measured is [not] that of laches . . . . The critical inquiry . . . is whether the petitioner is able to show justifiable reasons for the delay." *Id.* (quoting *Morgan*, 346 U.S. at 512).

IV. CONCLUSION

[10] We affirm the district court's denial of Riedl's petition for a writ of error coram nobis. Riedl has offered no valid reasons for her delay in attacking her convictions, and thus is ineligible for coram nobis relief. It is irrelevant that the government has not established prejudice as to Riedl's void-for-vagueness claim because the doctrine of laches only

becomes applicable once a petitioner has satisfied the second coram nobis requirement, which Riedl has not.

AFFIRMED.

FILED
APR 24 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff/Respondent,	)	CR. NO. 98-00624 ACK
v.	)	
BRIGITTE RIEDL	)	
Defendant/Petitioner.	)	

ORDER DENYING PETITION FOR WRIT OF ERROR CORAM NOBIS

On November 24, 1999, Brigitte Riedl ("Defendant") was convicted by a jury of one count of possession with intent to distribute cocaine, two counts of aiding and abetting the distribution of cocaine, one count of distributing cocaine, and five counts of money laundering. The jury additionally found by special verdict that nine properties owned by Defendant were involved in the money laundering offenses and were subject to forfeiture to the United States.

On December 20, 1999, Defendant filed a Motion to Set Aside Forfeiture. After hearing oral argument, the Court denied Defendant's Motion on January 7, 2000, finding that the forfeiture was not grossly disproportional to the gravity of Defendant's offense. The Court noted, however, that it would reconsider

the issue at the time of Defendant's sentencing, and {Page 1} ordered that the subject properties not be sold prior to sentencing.

On January 31, 2000, the Court issued a Preliminary Order of Forfeiture pursuant to 18 U.S.C. § 982(a)(1). The Order authorized the United States Marshals Service to seize and take possession of the nine properties implicated in the money laundering offenses pursuant to 21 U.S.C. § 853(g), as incorporated by 18 U.S.C. § 982(b)(1).

Defendant's sentencing, originally scheduled for March 13, 2000, was continued numerous times. On August 21, 2000, Defendant moved the Court to reconsider her Motion to Set Aside Forfeiture, again arguing that forfeiture of her properties constituted an excessive fine. On July 26, 2001, after hearing oral argument and expert testimony, the Court sentenced Defendant to sixty-six months imprisonment, followed by three years of supervised release. On August 13, 2001, the Court issued a Final Order of Forfeiture. On that same day, the Court issued an Order Denying Defendant's Motion to Set Aside Forfeiture as an Excessive Fine under the Eighth Amendment, denying Defendant's motion for reconsideration. Defendant appealed that order to the U.S. Court of Appeals for the Ninth Circuit.

On September 10, 2001, Defendant filed a Motion for Stay of Final Order of Forfeiture Pending Appeal. On October 11, 2001, the Court denied that motion. {Page 2}

On November 20, 2003, the U.S. Court of Appeals for the Ninth Circuit affirmed this Court's order denying Defendant's motion to set aside the forfeiture,

finding that the forfeiture "was not grossly disproportional to [Defendant's] offense" and Defendant "was sufficiently involved and culpable to negate a charge of sentencing entrapment or manipulation." See United States v. Riedl, 82 Fed. Appx. 538, 540-541 (9th Cir. 2003).

According to documents provided to this Court by Defendant (and not disputed by the Government), an Immigration Court judge ordered that Defendant be removed from the United States to Austria because of her convictions in this Court. The Board of Immigration Appeals affirmed the decision and Defendant was deported to Austria on May 24, 2004.

On January 18, 2006, approximately four and one-half years after her sentencing and the final order of forfeiture, Defendant filed a Petition for Writ of Error Coram Nobis ("Petition") with this Court pursuant to the All Writs Act, 28 U.S.C. § 1651(a). In the Petition, Defendant asserts that two fundamental errors underlie her money laundering convictions and the related forfeiture. First, Defendant argues that the money laundering statute under which she was convicted, 18 U.S.C. § 1956(a)(3)(B), is constitutionally void for vagueness as applied to Defendant's conduct. See Petition at 15; Reply at 10. Second, Defendant argues that the evidence at trial did not {Page 3} satisfy the statutory requirement that the money laundering affected interstate commerce. See Petition at 27; Reply at 12. Defendant seeks the following relief: (1) declaration that the money laundering statute, 18 U.S.C. § 1956(a)(3), is unconstitutional; (2) invalidation of the money laundering convictions; and (3) rescission of the Final Order of Forfeiture.

On February 23, 2006, the Government filed an Opposition to the Petition ("Opposition"). On March 13, 2006, Defendant filed a Reply. The Court finds that no hearing is warranted in this matter because the motions, files, and records of the case conclusively show that Defendant is not entitled to coram nobis relief. See United States v. Taylor, 648 F.2d 565, 573 (9th Cir. 1981) (where motions, files, and records of the case conclusively show that defendant is entitled to no relief, no hearing is required on petition for writ of error of coram nobis); see also Petition at 1 ("Ms. Riedl is not requesting an evidentiary hearing, as all the facts necessary to support the petition are contained in the underlying criminal case."); Opposition at 19 (requesting the Court to act "without hearing").

STANDARD

The writ of error coram nobis provides a remedy to attack a conviction when the petitioner has served his sentence and is no longer in custody. See Estate of McKinney v. United States, 71 F.3d 779, 781 (9th Cir. 1995). Specifically, the writ {Page 4} "provides a remedy for those suffering from the lingering collateral consequences of an unconstitutional or unlawful conviction based on errors of fact and egregious legal errors." See id. (quoting United States v. Walgren, 885 F.2d 1417, 1420 (9th Cir. 1989)) (internal quotation marks omitted).

Although Federal Rule of Civil Procedure 60(b) expressly abolishes the writ of error coram nobis in civil cases, this extraordinary writ still provides a remedy in criminal proceedings where no other relief is available and sound reasons exist for failure to

seek appropriate earlier relief. See Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987); see also United States v. Morgan, 346 U.S. 502, 505-506, n.4 (1954) (holding that district courts may issue the writ under the All Writs Act, 28 U.S.C. § 1651(a)).

To receive coram nobis relief, a petitioner must demonstrate four factors: "(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." Hirabayashi, 828 F.2d at 604; accord, McKinney, 71 F.3d 779, 781. "Because these requirements are conjunctive, failure to meet any one of them is fatal." See Matus-Leva v. United States, 287 F.3d 758, 760 (9th Cir. 2002). {Page 5} See also Morgan, 346 U.S. at 511 (coram nobis relief is available to challenge the validity of a conviction "only under circumstances compelling such action to achieve justice").

DISCUSSION

The Court will apply each of the four factors for coram nobis relief to the facts of this case.

A. A More Usual Remedy Is Not Available

A petitioner satisfies the first requirement for coram nobis relief by establishing that he is not in custody and, as a result, not eligible for habeas relief or relief under 28 U.S.C. § 2255. See United States v. Kwan, 407 F.3d 1005, 1012 (9th Cir. 2005). The Government concedes that Defendant "is no longer in custody, and thus, she has satisfied the first

requirement" that a more usual remedy is not available. See Opposition at 7.

B. No Valid Reason Exists for the Delay in Attacking the Conviction

In lieu of a specific statute of limitations on petitions for writ of error coram nobis, "courts have required coram nobis petitioners to provide valid or sound reasons explaining why they did not attack their sentences or convictions earlier." See Kwan, 407 F.3d at 1012-1013. "[C]ourts have denied relief on this ground where the petitioner has delayed for no reason whatsoever, where the respondent demonstrates prejudice, or where the petitioner appears to be abusing the {Page 6} writ" by attempting to "relitigate claims or circumvent procedural bars." Id., 407 F.3d at 1013. Here, the Court finds that the Petition must be denied because Defendant has not demonstrated any valid reason for the delay in challenging her conviction and the equitable doctrine of laches bars relief on the insufficiency of the evidence claim.

1. Defendant Has Presented No Valid Reason for the Delay

In the instant case, Defendant has provided no valid reason for why she did not challenge the constitutionality of the money laundering statute and/or the sufficiency of the interstate commerce evidence at trial, during the extensive post-trial briefings and arguments before this Court, or in her appeal to the Ninth Circuit Court of Appeals. Defendant's argument that "[b]ecause [she] was deported to Austria, her ability to find competent counsel willing to review her case and pursue her legal remedies under

coram nobis took some time" does not explain why she did not challenge her conviction prior to her deportation. See Petition at 3.

Nor does Defendant's other excuse - that "her 66-month incarceration period, her diminished capacity, and the fact that the Government had seized nine of her real properties worth $2.7 million prevented her from attacking the convictions earlier" - provide any legitimate reason to explain why Defendant did not challenge her conviction earlier. See Petition at 3-4. The {Page 7} Court can see no reason why a period of incarceration would prevent Defendant from challenging her conviction. Nor can the Court see how any diminished capacity[1] or loss of property[2] would prevent her from challenging her conviction where she was represented by counsel before this Court and in her appeal to the Ninth Circuit Court of Appeals.[3] In short, Defendant has provided no sound reason for why she did not raise the claims to this Court or the Court of Appeals during the trial, sentencing, hearings regarding forfeiture, or appeal phases. See Maghe v. United States, 710 F.2d 503, 503-504 (9th Cir. 1983) (per curiam) (coram nobis relief denied where defendant demonstrated no sound reason for waiting to challenge conviction,

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[1] The Court previously found that Defendant's mental incapacity was of a limited nature. See United States v. Riedl, 164 F. Supp. 2d 1196, 1201 (D. Haw. 2001).

[2] Not all of Defendant's properties were seized by the Government. Defendant's net worth, exclusive of the forfeited properties, was estimated at over $861,000 prior to her sentencing. See Petition, Exhibit A at ¶ 109.

[3] Defendant has retained multiple attorneys over the course of her defense, including David Klein, Alan Ellis, Richard J. Troberman, Wayne Anderson, Myles S. Breiner, J. Thomas Logan, and William W. Stewart; in addition to her current counsel.

even where he provided motive for seeking relief at the late date).

Nor has Defendant provided any sound reason for why she did not raise these challenges in a motion pursuant to 28 U.S.C. § 2255, prior to her deportation. See Reply at 5-7 (recognizing that Defendant could have filed a motion pursuant to § 2255 prior {Page 8} to her deportation). Although the Court may speculate as to what sound reasons Defendant may have had not to file a § 2255 motion prior to her deportation, it will not so speculate where Defendant has provided no explanation. Cf. Kwan, 407 F.3d 1005, 1013 (defendant who sought the advice of counsel and pursued legal remedies to address the collateral consequences of his conviction during the period of the delay, but whose counsel misled him by advising him that there was little chance his conviction would cause him to be deported, provided reasonable explanation for not challenging his conviction earlier).

Additionally, Defendant's sufficiency of the evidence claim is barred because it should have been raised on direct appeal. See United States v. Keane, 852 F.2d 199, 202 (7th Cir. 1988) ("Claims that could have been raised by direct appeal are outside the scope of the writ [of error coram nobis]."); Lipscomb v. United States, 273 F.2d 860, 865 (8th Cir. 1960 ("where the question sought to be litigated could be raised on appeal, the writ [of error coram nobis] will not lie"); Martinez v. United States, 90 F. Supp. 2d 1072, 1075 (D. Haw. 2000) (claims that could have been raised by direct appeal are outside the scope of the writ of error coram nobis), aff'd, 17 Fed. Appx. 517 (2001); accord United States v. Montalvo, No.

92-15668, 1993 WL 181381, at *1 (9th Cir. May 27, 1993) ("Claims that could have been raised by direct appeal are outside the scope of the writ [of {Page9} error coram nobis]."). [4] See also Marshall v. United States, 576 F.2d 160, 162 (9th Cir. 1978) (non-constitutional issues are improper for collateral review where no resulting fundamental defect would lead to a complete miscarriage of justice). But see United States v. Tucor Int'l, Inc., 189 F.3d 834 (9th Cir. 1999) (granting coram nobis relief on basis of statutory interpretation but failing to address the issue of whether the petition should have been denied on the basis that the claim could have been raised on a direct appeal). [5]

2. Doctrine of Laches Bars Relief on the Insufficiency of the Evidence Claim

A petition for writ of error coram nobis is subject to the equitable doctrine of laches, which bars a claim if unreasonable delay causes prejudice to the government. See Telnik v. United States, 24 F.3d 42, 45, 47 (9th Cir. 1994). For laches to bar a petitioner's

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[4] In accordance with U.S. Ct. of App. 9th Cir. Rule 36-3, the Court is not relying on this or any other unpublished opinion cited herein.

[5] The fact that Defendant did not raise her constitutional claim on direct appeal does not, by itself, bar the claim because the U.S. Court of Appeals for the Ninth Circuit has held that "constitutional claims may be raised in collateral proceedings even if the defendant failed to pursue them on appeal." See United States v. Schaflander, 743 F.2d 714, 717 (9th Cir. 1984). See also Telnik v. United States, 24 F.3d 42, 45 (9th Cir. 1994) (petition for writ of error coram nobis is a collateral attack on a criminal conviction).

claim, the government must first make out a prima facie showing of prejudice as a result of the {Page 10} defendant's delay in bringing the challenge to the conviction. Id. at 47. In making a determination of prejudice, the effect of the delay on both the government's ability to respond to the petition and the government's ability to mount a retrial are relevant. Id. at 48. If the government meets its burden of demonstrating prejudice, the burden of production of evidence then shifts to the petitioner to show either that the government actually was not prejudiced or that the petitioner exercised reasonable diligence in filing the claim. Id. at 47.

Here, the Government alleges that it has been prejudiced by Defendant's "failure to challenge her money laundering convictions on direct appeal and her four and one-half year delay in filing this Petition." See Opposition at 11. The Government cites to the potential unavailability of necessary witnesses, evidence, and trial materials. Id. The Government alleges that it would be "extremely difficult and expensive to reassemble the prosecution's case" because witnesses' memories have faded, one witness has died, the prosecution team has been dismantled, and the two primary investigators have retired. Id.

The Government has demonstrated prejudice to its ability to respond to the sufficiency of the evidence claim in the Petition. For example, the Government's inability to access its trial materials and exhibits for purposes of its response to the Petition precludes the Government from identifying specific {Page 11} exhibits that may have proved the interstate commerce element that Defendant is now challenging as insufficiently proved. For example, a

cashier's check or an application for a cashier's check (both admitted as evidence at trial) may contain some language suggesting that First Hawaiian Bank is involved in interstate commerce; however, unavailability of trial exhibits prevents the Government from reviewing those documents and making any appropriate argument here.[6]

In response to the Government's demonstration of prejudice in its ability to respond to the Petition, Defendant has not shown either that the government actually was not prejudiced or that Defendant exercised reasonable diligence in filing the claim.[7]

While the Government has demonstrated prejudice in its ability to respond to the sufficiency of the evidence claim in the Petition, it has not demonstrated prejudice to its ability to mount a retrial, because no retrial would be appropriate in this case even if the Court were to grant the Petition. If the Court {Page 12} were to find the statute unconstitutionally vague, the Government could not seek to reprosecute Defendant under that unconstitutional statute (and the Government has not alleged that it could or would seek to prosecute Defendant under any alternative statute). Similarly, if the Court were

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[6] The Government has not demonstrated prejudice to its ability to respond to the void-for-vagueness constitutional challenge because opposition to the constitutional challenge does not require analysis of exhibits or other trial documents in the same manner that is necessary for opposition to the insufficiency of the evidence claim.

[7] Defendant's arguments for why the Government was not prejudiced in responding to the Petition go to whether Defendant's delay was justified, and as addressed in section B(1) above, are without merit.

to find that there was insufficient evidence of interstate commerce to support the money laundering convictions, double jeopardy would bar a retrial on those money laundering counts. See United States v. Boulware, 384 F.3d 794, 809-810 (9th Cir. 2004) ("a challenge to the sufficiency of the evidence implicates a defendant's rights under the Double Jeopardy Clause"); United States v. Gergen, 172 F.3d 719, 724-725 (9th Cir. 1999) (defendant who successfully challenges a conviction for insufficiency of the evidence is entitled not only to a reversal of his conviction but also to a judgement of acquittal).

For these reasons, the Court finds that while the Government has not been prejudiced in its ability to mount a retrial, the Government has been prejudiced in its ability to respond to the Petition's sufficiency of the evidence claim. Therefore, the equitable doctrine of laches bars Defendant from obtaining relief on the sufficiency of the evidence claim. {Page 13}

C. Adverse Consequences of the Money Laundering Convictions Exist

The Ninth Circuit Court of Appeals has repeatedly reaffirmed the presumption that collateral consequences flow from any criminal conviction, and that the government carries the burden of disproving this presumption. See United States v. Walgren, 885 F.2d 1417, 1421 (9th Cir. 1989); Hirabayashi, 828 F.2d at 606. In this case, the Government has not sought to disprove this presumption of collateral consequences. See generally Opposition (not disputing that adverse consequences exist).

With Defendant's money laundering convictions, the jury returned a special verdict that nine properties owned by Defendant were involved in that money laundering and were subject to forfeiture. As a consequence, the Court ordered the nine real properties, with a total net value to Defendant of approximately $1.25 million, to be forfeited by Defendant. See United States v. Riedl, 164 F. Supp. 2d 1196 (D. Haw. 2001). The Court agrees with Defendant that deprivation of approximately $1.25 million is an adverse consequence of the convictions from which she is continuing to suffer. See Petition at 4.[8] The Court finds {Page 14} "adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III." Hirabayashi, 828 F.2d 591, 604.

D. No Fundamental Error Exists

Defendant asserts that two fundamental errors underlie her money laundering convictions and the related forfeiture. First, Defendant argues that the money laundering statute under which she was convicted, 18 U.S.C. § 1956(a)(3)(B), is constitutionally void for vagueness as applied to Defendant's conduct. See Petition at 15; Reply at 10. Second, Defendant argues that the evidence at trial did not satisfy the statutory requirement that her money laundering affected interstate commerce. See Petition at 27; Reply at 12. The Court has already found

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[8] Defendant does not assert that her deportation was an adverse consequence of her money laundering conviction, presumably because the decision to deport her was based also on her drug related convictions, which she is not challenging in the Petition.

that Defendant may not raise these claims at this late date because she has not presented a sound reason for the delay and relief on the insufficiency of the evidence claim is barred by laches. See, supra, section B. Nonetheless, even assuming that Defendant were permitted to raise these challenges at this late date, the Court finds no merit to her arguments.

1. The Statute Is Not Unconstitutionally Vague

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and {Page15} discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). The most important aspect of the doctrine is the second requirement: that the legislature establish minimal guidelines to govern law enforcement. Id. at 357-358; see also United States v. Kaufmann, 985 F.2d 884, 896 (7th Cir. 1993).

Defendant challenges 18 U.S.C. § 1956(a)(3)(B) as unconstitutionally vague as applied to the facts of this case.[9] To be convicted under this money laun-

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[9] The vagueness of a statute that does not threaten First Amendment interests is examined in light of the facts at hand, so that the statute is judged on an as-applied basis. See Maynard v. Cartwright, 486 U.S. 356, 361 (1988). Defendant is not arguing that the statute threatens First Amendment interests; rather, Defendant is arguing that the statute is void for vagueness as applied to the facts at hand. See Reply at 10. See also United States v. McLamb, 985 F.2d 1284, 1290 (4th Cir. 1993) (limited restraints on defendant's associational interests and ability to pursue lawful employment arguably imposed by 18 U.S.C. § 1956(a)(3) are not constitutionally cognizable, so that

dering sting operation statute,[10] the Government had to prove that Defendant had the {Page 16} specific intent to conceal or disguise the nature, location, source, ownership, or control of property she believed to be the proceeds of unlawful activity; that Defendant conducted or attempted to conduct a financial transaction involving that property; that representations about the property were made by law enforcement officers (or those acting under their direction); and that those representations relate to specified unlawful conduct enumerated in § 1956(c)(7).[11] See 18 U.S.C. § 1956(A)(3)(B); Kaufmann, 985 F.2d at 896; see also United States v. Loehr, 966 F.2d 201, 204 (6th Cir. 1992).

The Court finds that a person of ordinary intelligence can understand what conduct is prohibited by

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void-for-vagueness review is limited to determination of whether application of the statute to the conduct at hand violated the void-for-vagueness doctrine).

[10] 18 U.S.C. § 1956(a)(3)(B) provides:

> Whoever, with the intent - to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activety, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph . . . the term "represented" means any representtation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

[11] 18 U.S.C. § 1956(c)(7) defines the term "specified unlawful activity."

the statute.[12] Of {Page17} course, under the statute, an ordinary person will not know that undercover law enforcement officers are making the representations. See Kaufmann, 985 F.2d at 896. "However, the statute provides adequate notice that if [defendant] believes the property is the proceeds of specified unlawful activity, he incurs a high risk of liability if he conducts a financial transaction with the intent to conceal its ownership." Id., 985 F.2d at 896.[13] {Page 18}

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[12] Defendant argues that she is not a person of ordinary intelligence and therefore the statute is void for vagueness as it applies to her. See Petition at 25. Defendant fully argued the issue of her own diminished mental capacity in the underlying criminal case, and the Court will not permit her to re-litigate the issue in this Petition. See Martinez v. United States, 90 F. Supp. 2d 1072, 1075 (D. Haw. 2000) (coram nobis relief is not available to litigate issues already litigated) (citing Klein v. United States, 880 F.2d 250, 254 n.1 (10th Cir. 1989) and United States v. Montalvo, 1993 WL 181381 (9th Cir. May 27, 1993)); see also United States v. Riedl, 164 F. Supp. 2d 1196, 1201 (D. Haw. 2001) (finding that this Defendant suffers from diminished mental capacity but that she was capable of and did have the requisite intent, willingness, and ability to launder drug proceeds). Moreover, the test for vagueness in an as-applied challenge looks at whether a person of ordinary intelligence, not a person of defendant's intelligence, would have recognized that the conduct in question was criminal. See, e.g., McLamb, 985 F.2d at 1291 (the first requirement of the Kolender test is "that an ordinary person be able to recognize the conduct in question as criminal").

[13] The Court is not persuaded by Defendant's arguments that the law enforcement officer must identify herself to defendant as an officer or that the money given to the defendant must actually be the proceeds of unlawful activity. See Petition at 17-18, 25. "The money laundering statute forbids certain acts performed with a given specific intent, and where the legislature confines itself to the criminalization of acts with a required mens rea and does not attempt to outlaw a status or

Here, the Government presented evidence that undercover officers repeatedly represented that the money with which they proposed to purchase Defendant's properties was proceeds of unlawful drug dealing activity, and any ordinary person would have recognized it as such. Indeed, Defendant tried to conceal from bank employees how and where she obtained the money, stating for example that it was her own money that she obtained through a sale of property in Austria. See Petition at 20. The statute clearly and unambiguously describes the conduct that is prohibited, and an ordinary person such as Defendant could understand that prohibition. See Kaufmann, 985 F.2d at 896 (18 U.S.C. § 1956(a)(3)(B) is "unambiguous" and "an ordinary person" would be able to "understand what conduct is prohibited;" concluding "that § 1956(a)(3)(B) is not

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condition, neither the Constitution's ban on cruel and unusual punishment nor its guarantee of due process permit the court to second-guess the legislature's determination that the proscribed conduct is harmful. See McLamb, 985 F.2d at 1291-1292. Additionally, "the mere facts that the government employs subterfuge to catch the criminal and that the crime can only be committed with the cooperation of a governmental actor are not constitutionally damning." Id. at 1292. Finally, the Court has already found that the Government did not engage in sentencing manipulation or entrapment in the underlying criminal case, and the Court will not permit Defendant to re-litigate the issue in this Petition. See Martinez v. United States, 90 F. Supp. 2d 1072, 1075 (D. Haw. 2000) (coram nobis relief is not available to litigate issues already litigated) (citing Klein v. United States, 880 F.2d 250, 254 n.1 (10th Cir. 1989) and United States v. Montalvo, 1993 WL 181381 (9th Cir. May 27, 1993)); see also United States v. Riedl, 82 Fed. Appx. 538, 540-541 (affirming district court's finding that Defendant was sufficiently involved and culpable to negate a charge of sentencing entrapment or manipulation).

void for vagueness"); McLamb, 985 F.2d at 1291 (18 U.S.C. § 1956(a)(3) is not unconstitutionally vague as it applies to defendant's conduct because, in part, "any ordinary person [would] be able to recognize the conduct in question as criminal"); Loehr, 966 F.2d 201, 204 (18 U.S.C. § 1956(a)(3)(B) "is clear and applies to anyone who has the requisite intent to engage in the conduct as defined in the statute;" concluding that § 1956(a)(3)(B) is not void for vagueness); see also United States v. Tolley, No. 98-{Page 19} 10503, 1999 WL 958488, at *1 (9th Cir. Oct. 19, 1999) ("18 U.S.C. § 1956(a)(3)(B) defines the conduct it prohibits with sufficient definitiveness" and is not unconstitutionally vague) (internal quotations and citations omitted).[14]

The Court also finds that the statute is not written in a manner that would encourage arbitrary or discriminatory enforcement, as applied to the facts of this case. See Kaufmann, 985 F.2d at 896 (18 U.S.C. § 1956(a)(3)(B) is "unambiguous" and "not written in a manner that would encourage arbitrary and discriminatory enforcement;" concluding "that § 1956(a)(3)(B) is not void for vagueness"); McLamb, 985 F.2d at 1291 ("[n]o obvious danger of arbitrary enforcement is presented" by 18 U.S.C. § 1956(a)(3); concluding the statute is not unconstitutionally vague as it applies to defendant's conduct); Loehr, 966 F.2d 201, 204 (concluding that 18 U.S.C. § 1956(a)(3)(B) is not void for vagueness); see also Tolley, 1999 WL 958488, at *1 ("18 U.S.C. § 1956(a)(3)(B) defines the

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[14] In accordance with U.S. Ct. of App. 9th Cir. Rule 36-3, the Court is not relying on this or any other unpublished opinion cited herein.

conduct it prohibits with sufficient definitiveness to establish minimal guidelines to govern law enforcement" and is not unconstitutionally vague) (internal quotations and citations omitted). The Court finds that the statute provided law enforcement officers in this case with sufficient guidelines so as to prevent "a standardless sweep." {Page 20} See Kolender, 461 U.S. 352, 358.

Accordingly, the Court finds that 18 U.S.C. § 1956 (a)(3)(B) is not void for vagueness.

2. The Interstate Commerce Element Was Proven at Trial

In a money laundering prosecution under 18 U.S.C. § 1956(a)(3)(B), a nexus with interstate commerce is both a jurisdictional requirement and an essential element of the offense. See United States v. Bazuaye, 240 F.3d 861, 863 (9th Cir. 2001) (quoting United States v. Ladum, 141 F.3d 1328, 1339 n. 2 (9th Cir. 1998)) (nexus with interstate commerce is jurisdictional requirement and essential element of any money laundering prosecution). The statute requires that the defendant "conduct[] or attempt[] to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(3)(B) (emphasis added).

The term "financial transaction" is defined as:

> (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle,

> vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.

18 U.S.C. § 1956(c)(4) (emphasis added). "Incidental involvement or use" of a financial institution engaged in interstate commerce is enough to satisfy the financial transaction requirement. See {Page 21} United States v. Oliveros, 275 F.3d 1299, 1303 (11th Cir. 2001) (FBI's withdrawal of cash from bank before giving cash to defendant, and FBI's deposit of checks received from defendant into bank constituted sufficient involvement of a financial institution to affect interstate commerce); see also Bazuaye, 240 F.3d at 864-865 (interstate commerce need be involved only to "minimal degree").

Defendant admits that the evidence demonstrated that she took cash to First Hawaiian Bank and had it converted into cashier's checks and that she gave the cashier's checks to the escrow company as deposits for real estate transactions. See Petition at 28. She argues, however, that the Government did not prove that these transactions were "financial transactions" within the meaning of the statute because, she argues, the Government did not introduce evidence that First Hawaiian Bank or the escrow company were engaged in interstate commerce. See Petition at 27-28; Reply at 12.[15] {Page 22}

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[15] The Court notes that undercover officers represented to Defendant that the money involved in the money laundering transactions came from drug activities in Las Vegas, Nevada. Additionally, when Defendant purchased cashier's checks, she told the bank teller that the money (which Defendant thought

The Court finds that the Government presented sufficient evidence that Defendant conducted "financial transactions" within the meaning of the statute when she took cash to First Hawaiian Bank and had that cash converted into cashier's checks, and when she deposited those checks with Independent Escrow Service, because "processing checks through normal banking channels involves financial institutions which are engaged in interstate commerce to [the] minimal degree" required by the statute. See Bazuaye, 240 F.3d at 865 (defendant's use of normal banking channels, by use of a check, is sufficient to satisfy the interstate commerce element of money laundering offense); see also id. at 864-865 (where stipulated facts regarding credit card companies make no mention of interstate commerce and never use the word "bank," judge is not required to ignore common sense in finding that use of a check issued by a credit card company involves the use of normal banking channels and thus involves interstate commerce); cf. Oliveros, 275 F.3d at 1303 (FBI's withdrawal of cash from bank before giving cash to defendant, and FBI's deposit of checks received from defendant into bank constituted sufficient involvement of a financial institution to affect interstate commerce); United States v. Mejia, No. 97-50353, 1998 WL 895380, at *6 (9th Cir. Dec. 17, 1998) (pur-

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was drug money from Las Vegas) was proceeds from the sale of her property in Austria. However, the Court has not found any case law indicating that a representation, made by an undercover officer or a defendant, that the money came from a transaction made outside of the state would be enough to satisfy the interstate commerce requirement; and therefore the Court does not place any weight on those representations.

chase of a cashier's check had an effect on interstate commerce because the cashier's check was purchased at a bank {Page 23} engaged in interstate commerce).

A bank teller who issued a cashier's check to Defendant testified that the bank had to file a "currency transaction report" with the IRS, reporting the transaction in which Defendant purchased a $320,000 cashier's check, because "anything over $10,000 has to be reported to the IRS." See Nov. 16, 1999 Trial Transcript at 22-23. Another bank employee testified that a currency transaction report was "required by the federal government" for Defendant's purchase of a cashier's check because such a report must be filed for any monetary transaction exchange over $10,000. See Nov. 4, 1999 Trial Transcript at 132. A copy of at least one currency transaction report, from one of Defendant's cashier's checks, was introduced at trial. Id. This testimony and evidence that First Hawaiian Bank was required to (and did) report Defendant's cashier check purchases to the federal government/IRS supports the jury's conclusion that the transactions involved the use of a financial institution which had, at least, a de minimis effect on interstate commerce. See United States v. Leslie, 103 F.3d 1093, 1022 (2d. Cir. 1997) (use of word "federal" in a bank's name "supports a jury's conclusion that the transaction involved the use of a financial institution which has, at least, a de minimis effect on interstate commerce"). {Page 24}

Moreover, the transactions that form the basis of the money laundering convictions were all part of the overall real estate transactions in which Defendant was attempting to transfer title of her real

properties to the undercover officers.[16] The Court finds that the transfers of the real property (though never fully consummated because of Defendant's arrest before closing) affected interstate commerce because they were part of the interstate real estate market in Hawaii. See, e.g., Russell v. United States, 471 U.S. 858, 862 (1985) (rental of real estate affects interstate commerce); United States v. Evans, 285 F.3d 664, 671 (8th Cir. 2002) (purchase of real estate affects interstate commerce for purpose of money laundering statute).[17] {Page 25}

Accordingly, the Court finds that the interstate commerce element of the money laundering convictions was sufficiently proven at trial.

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[16] The Court notes that in considering Defendant's appeal, the Ninth Circuit Court of Appeals made the following findings, among others. It found that "Riedl was well aware of the source of the money being used to purchase her property; she encouraged the undercover officers to convert their illegal proceeds into safe and stable sources of value. Moreover, Riedl actively planned and helped structure the money laundering transactions. The forfeiture therefore was not grossly disproportional to Riedl's offense." Riedl, 82 Fed. Appx. 538, 540. It also found that "It was Riedl who initiated most of the early discussions with the undercover officers about the sale of her properties; she repeatedly encouraged the officers to purchase real property from her to enhance their financial security, and she expressed no concern when told (numerous times) that the source of the money to be used for the purchases was 'drug money.'" Id., at 540-541.

[17] The Court notes that there may have been other evidence of interstate commerce introduced at trial, but because the Government was prejudiced in its ability to respond to the Petition, it has not presented that evidence in its opposition. See, supra, section B(2).

CONCLUSION

The Court denies Defendant's Petition for Writ of Error Coram Nobis because (1) no valid reason exists for why Defendant did not attack the conviction earlier, (2) the equitable doctrine of laches bars Defendant's claim for insufficiency of the evidence, and (3) no fundamental error underlies Defendant's conviction because the money laundering statute is not void-for-vagueness and the interstate commerce element was sufficiently proven at trial.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 21, 2006.

SEAL OF THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

s/ *Alan C. Kay*
Alan C. Kay
Sr. United States
District Judge

United States v. Riedl, Cr. No. 98-00624 ACK; Order Denying Petition for Writ of Error Coram Nobis.

{Page 26}

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRIGITTE RIEDL,
Defendant-Appellant.

No. 06-10424

D.C. No.
CR-98-00624
ACK

ORDER

Before: THOMPSON, RYMER and FISHER,
Circuit Judges.

The mandate, issued August 28, 2007, is recalled.

The panel has voted to deny the suggestion for rehearing en banc, and Judge Thompson recommended denying the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehearing the matter en banc. Fed. R. App. P. 35.

Appellee's (sic) petition for rehearing and suggestion for rehearing en banc, filed September 17, 2007, is **DENIED**.

Appellant's motion to recall or stay the mandate, filed September 17, 2007, is **DENIED**.